IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Criminal Appeal No. 62-DB of 2004

Date of Decision :- November 2, 2006

Sabrullah ....APPELLANT

VERSUS

Assistant Commissioner of Customs, Raja Sansi Airport, Amritsar.

....RESPONDENT

CORAM: HON'BLE MR. JUSTICE MEHTAB S.GILL
HON'BLE MR. JUSTICE BALDEV SINGH

Present:- Mr. Kanwaljit Singh , Advocate and
Mr. B.S. Sran, Advocate
for the appellant.

Mr. Devinder Dutt Sharma, Advocate for Union of India.

MEHTAB S.GILL, J.

This is an appeal against the judgment/order dated 16.8.2001 of the learned Additional Sessions Judge-cum- Special Judge, Amritsar whereby he convicted Sabrullah son of Mohamad Alam alias Ilham, resident of Kapisa City Kabul, Afghanistan under Sections 22 and 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter

called as "NDPS Act") and sentenced him to undergo 18 years rigorous imprisonment and to pay a fine of Rs. one lac each under Sections 22 and 23 of the NDPS Act, in default to further undergo rigorous imprisonment for three years. Both the sentences were ordered to run concurrently.

Sh. Balwinder Singh PW1, Inspector Customs, Raja Sansi Airport, Amritsar, filed a complaint Ex.PG in the Court of Addl. Sessions Judge, Amritsar wherein he stated that he was filing the complaint in his official capacity as a public servant. He stated, that the accused is an Afghan national. On 26.6.1998 the accused landed at Raja Sansi Airport by flight No. FG-306 of Ariana Afghan Air Lines. It was about 10 p.m. The accused came at the Customs Counter and gave his baggage i.e. one small bag and three large bags for customs clearance. The accused was feeling a bit nervous. The complainant became suspicious and he informed his senior officers. He asked the accused as to whether he wanted to be searched by any Magistrate or Gazetted Officer of the Customs Department. Option memo. was prepared, which was thumb marked by the accused. Shri Surjit Singh PW5, Superintendent Customs was called. Subheg Singh and Kailash independent witnesses were also called. On the search of the baggage, 500 cartons of cigarettes of Seven Star quality containing 5000 packets of cigarettes were recovered. Out of 5000 packets of cigarettes, brown/white powder of heroin was recovered from 206 packets of cigarettes. 160 packets of cigarettes were containing white powder. Thereafter he divided them into eight lots bearing No. 1

to 8. The total weight of these lots was 8 Kg. 370 grams. Similarly brown powder heroin was recovered from 46 packets. It was divided into two lots of 23 packets each. The weight of the heroin recovered from 46 packets was 1 Kg. 880 grams. The brown and white powder heroin was tested with the Drug Testing Kit, which gave a positive result. The total worth of this heroin in the market was Rs.47,26,000/-. Thereafter all the lots were made homogeneous. Two samples each, weighing approximately 5 grams were drawn from each of the ten lots of brown/white powder heroin. All the samples were sealed in a polythene bag, with seal No.120 of the Customs Division, Amritsar. The remaining consignment was put in 10 bags of white cloth, which was later on put in a tin box. Tin box was also sealed and wrapped in a white cloth. The heroin was taken into possession. On 27.6.1998, accused made a voluntary statement without any threat, inducement or promise before the Superintendent Customs Sh. Surjit Singh PW5. On 28.6.1998 10 packets of samples marked L1 to L10 were handed over to Sanjiv Parbhakar PW2, Inspector Customs, Amritsar to deposit in the office of Chemical Examiner, New Delhi and these samples were deposited on 29.6.1998. The remaining bulk of heroin and samples were deposited in the Malkhana Customs House, Amritsar on 30.6.1998. The report of the Chemical Examiner, Govt. of India was that the powder sent, was containing diacetylmorphine (heroin).

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The prosecution to prove its case brought into the witness box Balwinder Singh Inspector Customs as PW1, Sanjiv Prabhakar Inspector as PW2, Sanjiv Sharma Inspector Customs as PW3, Suresh Kumar Malkhana Incharge as PW4 and Surjit Singh Superintendent Customs as PW5.

Appellant also produced two witnesses Sushil Rajan DW1, ACIO-II (General), Immigration Cell Raja Sansi Air Port and Tejinder Singh DW2, Inspector Customs, Raja Sansi Air Port.

Learned counsel for the appellant has argued that as per the statement of Balwinder Singh PW1, Inspector Customs, it was on secret information that the search was done. Section 42 of the NDPS Act was not complied with. Though offer was made for search by a Gazetted Officer or a Magistrate, but the offer was partial, as Balwinder Singh PW1, Inspector Customs asked the appellant whether he wanted to be searched by an Officer of the Customs Department. Appellant was restricted to be searched only by the Customs Department. This itself was a violation of Section 50 of the NDPS Act.

Appellant did not know how to speak either in Hindi, Punjabi or Urdu. Being an Afghan national he knew only his own language i.e. Pushto. One Mohd. Zilmi though was joined as an interpreter, but the only place where his presence is marked is document Ex.PD where Mohd. Zilmi has put his thumb impression.

Ex.PD is the confessional statement, which allegedly was given on 27.6.1998 to Surjit Singh PW5, Superintendent Customs. The link evidence in respect of the luggage, being that of the appellant is missing. Appellant as per documents Ex.D1, Ex.D2 and Ex.D3 had brought carpets. The bags, which have been shown to be that of the appellant from which the contraband was recovered, have not been shown in these documents. No chit on the bags put by the Airlines authorities to mark the luggage of a passenger was there nor was there any document in the possession of the appellant that the recovered bags from which allegedly heroin was recovered belonged to the appellant.

Learned counsel for the Customs Department has argued that the confessional statement Ex.PD was voluntarily made without any undue pressure or coercion. The questions to be answered were transcripted by one Mohd. Zilmi who thumb marked the confessional statement Ex.PD and also gave the number of his passport. Section 42 of the NDPS Act is not applicable in this case, as Balwinder Singh PW1, Inspector Customs had general information and no specific information about appellant carrying the contraband. Section 50 of the NDPS Act would also not be attracted, as Section 50 would have come into effect only if the personal search of the appellant was to be done. It was the baggage of the appellant, which was to be searched. In his statement under Section 313 of Criminal Procedure Code, in answer to question No.2, appellant has stated that he carried one small bag and three large bags with him when he entered India

and he presented them to the Customs authorities to have them checked. The link between the bags and the appellant is amply proved by his own confession to question No.2.

We have heard the learned counsel for the parties and perused the record with their assistance.

The main thrust of the arguments of the learned Counsel for the appellant is that the link between the bags from which the contraband was recovered and the appellant being the owner of these bags is missing; from the documents Ex.D1, D2 and D3, it is not clear as to whether the documents are in any way connected with the appellant. This argument of the learned counsel does not cut much ice. Appellant himself in answer to question No.2, when examined under Section 313 Cr.P.C., was asked that when he appeared before Balwinder Singh PW1, Inspector Customs for clearance, at that time had he one small and three large bags. Appellant has answered, that it is correct that he had these bags with him when he appeared before Balwinder Singh PW1. The link between the bags from which the contraband was recovered and the appellant is proved by the answer given by the appellant himself.

The confessional statement Ex.PD of the appellant does not seem to have been taken by coercion or threat, as at that time there was another Afghan national by the name of Mohd. Zilmi present when the statement of the appellant was being recorded. After the confessional statement Ex.PD was recorded, Mohd. Zilmi put his left thumb impression

and had also given his passport No. OR-542384, dated 27.6.1998 on document Ex.PD. Sanjiv Sharma PW3, Inspector Customs and Surjit Singh PW5, Superintendent Customs have also signed on it as a token of its correctness. The Hon'ble the Supreme Court in **K.I. Pavunny Vs. Assistant Collector, Central Excise Collectorate, Cochin, 1997 (2) Recent Criminal Reports page 48** has held that confessional statements made by accused to a Custom Officer is admissible in evidence, a Custom Officer is not a Police Officer and a Custom Officer is not empowered to file charge-sheet under Section 173 Cr.P.C. A Custom Officer though is empowered to arrest, investigate and search, but he does not become a Police Officer within the meaning of Section 25 of the Evidence Act.

We are of the considered opinion that in this case, the confessional statement Ex.PD is voluntary and as already stated has been written without any type of coercion or threat.

Learned counsel for the appellant has relied upon a judgment of this Court in case **Inder Singh Vs. Inspector Customs, Raja Sansi Airport Customs Division, Amritsar, 2004 (2) Recent Criminal Reports page 203**, wherein this Court reduced the sentence of the accused from 15 years RI to 10 years RI as it seemed that the accused was just a carrier. In the case in hand also, it seems that the appellant/accused is a carrier. It has come on record that the appellant is an uneducated man. Apart from knowing his own language, he cannot speak any other language. During the course of arguments, learned counsel for the

appellant had also stated that in the alternative, the sentence of the appellant be reduced, as he was only a carrier. Learned counsel has further stated that the appellant has undergone 8-½ years of actual sentence. During the course of this sentence, the father of the appellant died.

We do not find any infirmity in the judgment of the learned trial Court apart from the fact that sentence is on the higher side. Sentence of appellant is reduced from 18 years rigorous imprisonment to 10 years rigorous imprisonment each under Sections 22 and 23 of the NDPS Act, as the appellant seems to be a carrier only. Fine of Rs. one lac each shall remain intact, in default of payment of fine; appellant shall undergo one year rigorous imprisonment. Both the sentences shall run concurrently.

(MEHTAB S.GILL)
JUDGE

(BALDEV SINGH)
JUDGE

November 2, 2006
SKA

WHETHER TO BE REFERRED TO REPORTER? YES/NO